Filed 12/6/16 P. v. Waddell CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RONNIE R. WADDELL, Defendant and Appellant.	B263977 (Los Angeles County Super. Ct. No. PA082317)

APPEAL from a judgment of the Superior Court of Los Angeles County. Cynthia L. Ulfig, Judge. Affirmed with directions.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, and Ilana Herscovitz, Deputy Attorney General, for Plaintiff and Respondent.

Ronnie R. Waddell appeals from the judgment entered following a jury trial in which he was convicted of attempted murder (Pen. Code,[1] §§ 664/187, subd. (a); count 1), aggravated mayhem (§ 205; count 2), and assault with a firearm (§ 245, subd. (a)(2); count 3). The jury also found true the allegations as to all counts that appellant personally used a firearm (§ 12022.53, subds. (b)–(d) (counts 1 and 2), § 12022.5 (count 3)), and personally inflicted great bodily injury (§ 12922.7, subd. (a)). Following a waiver of his right to a trial on prior conviction allegations, appellant stipulated that he had suffered two prior convictions for burglary under the "Three Strikes" law (§ 667, subd. (b)–(j)), that the convictions were serious felonies (§ 667, subd. (a)(1)), and that he had sustained three prior convictions for which he served prison terms (§ 667.5, subd. (b)). The court sentenced appellant to an aggregate term of 60 years to life in state prison.[2]

---

[1] Undesignated statutory references are to the Penal Code.

[2] The sentence consisted of 25 years to life on count 1, plus 25 years to life for the personal firearm use enhancement (§ 12022.5, subd. (d)), plus 5 years for each of the two prior serious felony convictions (§ 667, subd. (a)(1)). The court stayed the sentences imposed on counts 2 and 3 (§ 654), and stayed imposition of sentence on the prior prison term enhancements (§ 667.5, subd. (b)). As to count 3, the minutes and abstract of judgment indicate the court imposed and stayed the upper term. However, the court's oral declaration of the sentence reflects that the court imposed and stayed the mid-term of three years for count 3. The court's oral pronouncement prevails over the minutes and the abstract of judgment. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1070.) The latter must therefore be corrected to accurately reflect the sentence imposed.

Appellant contends the evidence was insufficient to support the jury's finding that he did not act in self-defense. Alternatively, the trial court prejudicially erred in failing to instruct sua sponte with CALCRIM No. 3476, defense of property. Finally, appellant asserts that the trial court's failure to instruct the jury to begin deliberations anew when it substituted an alternate juror requires reversal. We disagree and affirm.

FACTUAL BACKGROUND

On the evening of October 2, 2014, appellant drove John A. to a house in Granada Hills where Chris L. lived with his brother, Jon L., Jay F., and Jay's mother and brother. John believed Chris was moving out of town the next day, and he wanted to retrieve a tile saw he had loaned to Chris.

Appellant and John arrived in appellant's SUV, which appellant parked on the lawn near the front door of Chris's house. As appellant and John exited the vehicle, Chris ran out of the house yelling at them to get their truck off the lawn. John demanded the return of his saw, but Chris refused, and Chris and John started arguing. Chris threatened to smash the SUV's windshield if the vehicle was not moved in five seconds. At this point, appellant moved to the driver's side of the SUV, using a cane to walk and wobbling "like a really old man."

Chris went into the house and returned with a four foot long wooden two-by-four. Holding the two-by-four over his left shoulder with both hands, Chris rushed toward appellant, who was standing between the open door and the driver's seat of the SUV. As Chris approached the front of the vehicle and threatened to smash the windshield with the two-by-four, appellant pointed the cane at Chris, resting it on the open window frame of the SUV. Appellant's expression remained impassive as he warned, "Oh, I wouldn't do that."

Chris held the two-by-four over his head and hesitated for a moment before swinging it down onto the windshield. Appellant's cane turned out to be a firearm loaded with birdshot ammunition. Immediately after Chris struck the windshield, appellant fired the cane gun directly at Chris.

The force of the gunshot at such close range threw Chris 10 feet away. Chris was bleeding profusely from his arm, chest, and abdomen.

Immediately after the shooting, appellant and John got into the SUV and sped away. As they drove, appellant told John he was afraid Chris would not survive, and appellant would "get life" if he got caught. They zigzagged through town, avoiding the main roads on their way to a friend's house. Appellant stopped the SUV in an alley and threw the cane gun into a dumpster. He and John later abandoned the vehicle.

Chris suffered 36 wounds to his chest alone from the pellets. He underwent three surgeries for his injuries, including a nine-inch skin graft from his leg. At the time of trial, multiple pellets remained in his chest and abdomen.

DISCUSSION

Substantial evidence supports the jury's determination that appellant did not act in self-defense.

Appellant contends that because no reasonable jury could find the prosecution met its burden of proving beyond a reasonable doubt that appellant did not act in lawful self-defense, the evidence was insufficient to justify the verdict. We disagree.

Self-defense renders the use of force against another person justifiable and noncriminal where the defendant acted under an actual and reasonable belief in the need to defend against imminent danger of death or great bodily injury. (*People v. Stitely* (2005) 35 Cal.4th 514, 551; *People v. Humphrey* (1996)

13 Cal.4th 1073, 1082 (*Humphrey*).) The force used must be no more than is reasonably necessary to defend against the threat; force that is unreasonable under the circumstances is excessive and will not support a claim of self-defense. (*People v. Hernandez* (2011) 51 Cal.4th 733, 747; see also *People v. Ross* (2007) 155 Cal.App.4th 1033, 1056; Millman et al., Cal. Criminal Defense Practice (2016) ch. 73, § 73.11 ["The degree of resistance used in self-defense must not be clearly disproportionate to the nature of the injury threatened or inflicted"].) The burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense rests with the People. (*People v. Lloyd* (2015) 236 Cal.App.4th 49, 63 ["prosecution's burden to prove the absence of justification beyond a reasonable doubt"]; *People v. Banks* (1976) 67 Cal.App.3d 379, 384.)

Where, as here, a defendant challenges the sufficiency of the evidence to support the jury's finding that the defendant did not act in lawful self-defense, " 'we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Gurule* (2002) 28 Cal.4th 557, 630; *People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317–320.) Although the reviewing court must reverse a conviction where the verdict finds no discernable support in the record, "it is the jury, not the reviewing court, that must weigh the evidence, resolve conflicting inferences, and determine whether the prosecution established guilt beyond a reasonable doubt. (*People v. Yeoman* (2003) 31 Cal.4th 93, 128.) And if the circumstances reasonably justify the trier of fact's findings, the reviewing court's view that the circumstances might

also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Abilez* (2007) 41 Cal.4th 472, 504.)" (*People v. Hubbard* (2016) 63 Cal.4th 378, 392.)

Accepting the jury's resolution of the conflicts in the testimony, we find ample evidence on this record to support the jury's rejection of appellant's self-defense claim.

Self-defense has both a subjective and an objective component. That is, a defendant must have acted under an actual subjective fear " 'of *imminent* danger to life or great bodily injury' " from an unlawful attack or threat, and that belief must have been objectively reasonable. (*Humphrey*, *supra*, 13 Cal.4th at p. 1082.) Here, the evidence supports a finding that appellant's self-defense claim failed to meet either requirement. Appellant's calm and cool demeanor throughout the incident and his quiet warning to Chris not carry out his threat to smash the windshield are at odds with the claim that appellant actually believed Chris posed an imminent danger to his life or personal well-being.

There was also evidence from which the jury could conclude that any fear of injury appellant might have had was objectively unreasonable under the circumstances. Chris never threatened appellant personally, but instead repeatedly threatened to smash the windshield of the SUV if appellant did not move it off the lawn. When Chris raised the two-by-four over his head, it was clear to all three witnesses he was not aiming at appellant, but was determined to strike the vehicle's windshield. Chris himself testified that his objective was to smash the windshield when appellant failed to heed his warnings that he would do just that if the SUV were not moved immediately off the lawn.

The evidence further supported the jury's determination that appellant shot Chris in retaliation for hitting the windshield rather than out of a reasonable belief that the immediate use of force was necessary to defend himself. While Jon and Jay described the shooting and striking of the windshield as simultaneous events, John, Jay,[3] and Chris all testified that appellant fired immediately *after* Chris struck the windshield. Thus, when appellant fired his gun, Chris had already smashed the windshield and appellant was under no threat of physical harm. The law of self-defense justifies "the use of whatever force [is] necessary to avert the threatened peril" (*People v. Scoggins* (1869) 37 Cal. 676, 684; *Humphrey*, *supra*, 13 Cal.4th at pp. 1094–1095 (conc. opn. of Brown, J.)), but the right may not be used to justify an act of retaliation or vengeance (*People v. Bates* (1967) 256 Cal.App.2d 935, 939). The jury's resolution of this conflict in the testimony provides substantial evidence for the conclusion that appellant fired in response to Chris striking his windshield, and not in self-defense.

Finally, the jury could reasonably conclude that appellant used excessive force under the circumstances. "In defending himself, . . . a person may use only that force which is necessary in view of the nature of the attack." (*People v. Clark* (1982) 130 Cal.App.3d 371, 377; *Humphrey*, *supra*, 13 Cal.4th at p. 1094 (conc. opn. of Brown, J.).) The question of whether the force used was excessive under the circumstances is for the jury to decide.

---

[3] After testifying on direct examination that appellant "just shot him" after Chris smashed the windshield, on cross-examination, Jay agreed with defense counsel's characterization of the events as simultaneous.

(*People v. Moody* (1943) 62 Cal.App.2d 18, 23 ["extent to which one may make resistance against an aggressor is a fact which must be determined by the jury by keeping in mind the amount or extent of force which a reasonable person would employ under similar circumstances"].) Here, the conclusion that the force appellant used was excessive finds ample support in the evidence that in response to Chris's act of smashing the windshield, appellant shot him at close range using a firearm disguised as a cane.

In arguing that substantial evidence does not support the rejection of a self-defense theory, appellant essentially urges us to reweigh the evidence and draw our own inferences contrary to those made by the jury. This we will not do. (*People v. Alexander* (2010) 49 Cal.4th 846, 917; *People v. Klvana* (1992) 11 Cal.App.4th 1679, 1703 ["it is inappropriate to ask an appellate court to reweigh the evidence and draw inferences which were rejected by the jury"].)

Any error in the trial court's failure to instruct the jury sua sponte on defense of property was harmless.

As an alternative to his challenge to the jury's rejection of his self-defense claim, appellant contends the trial court erred in failing sua sponte to instruct on defense of property pursuant to CALCRIM No. 3476.[4] While we reject respondent's assertion that

---

[4] As relevant here, CALCRIM No. 3476 provides:

"The owner . . . of [personal] property may use reasonable force to protect that property from imminent harm. . . .

"*Reasonable force* means the amount of force that a reasonable person in the same situation would believe is necessary to protect the property from imminent harm.

the evidence was insufficient to support instruction on defense of property, we nevertheless conclude that any error in failing to give the instruction was harmless.

A defendant has a right to have the trial court instruct sua sponte on any affirmative defense on which the defendant relies or for which there is substantial evidentiary support, as long as the defense is not inconsistent with the defendant's theory of the case. (*People v. Anderson* (2011) 51 Cal.4th 989, 996–997.) "In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.' " (*People v. Salas* (2006) 37 Cal.4th 967, 982–983.) Given the evidence that Chris repeatedly threatened to smash the windshield with the two-by-four, there was sufficient evidentiary support to warrant a defense of property instruction. Appellant's explicit reliance on a self-defense theory did not preclude instruction on defense of property because such instruction was not inconsistent with appellant's theory of the case.

"When deciding whether the defendant used reasonable force, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

"The People have the burden of proving beyond a reasonable doubt that the defendant used more force than was reasonable to protect property from imminent harm. If the People have not met this burden, you must find the defendant not guilty of [the charged crime]."

However, we reject appellant's contention that the court's failure to instruct on defense of property in this case amounted to a constitutional violation requiring reversal absent a showing that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.)

Appellant had every opportunity to fully present his defense to the jury, and did so, arguing theories of perfect and imperfect self-defense as well as heat of passion. The jury was also instructed on these theories, and rejected them. "Mere instructional error under state law regarding how the jury should consider evidence does not violate the United States Constitution." (*People v. Carpenter* (1997) 15 Cal.4th 312, 393.) Moreover, no published opinion in California has embraced the *Chapman* standard for a failure to instruct; rather, published opinions have uniformly applied the *Watson*[5] test of assessing prejudice in these circumstances. (*People v. Watt* (2014) 229 Cal.App.4th 1215, 1219 [noting all "published opinions have concluded that the *Watson* test applies"].)

"In applying the *Watson* standard, we may look to the other instructions given, as well as whether the evidence supporting the existing judgment is so relatively strong, and the evidence supporting a different outcome is so comparatively weak, that there is no reasonable probability that the error affected the result." (*People v. Watt*, *supra*, 229 Cal.App.4th at p. 1220, citing *People v. Breverman* (1998) 19 Cal.4th 142, 177; *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1849.) Here, we find no reasonable likelihood of a more favorable outcome had the trial court instructed the jury on defense of property.

---

[5] *People v. Watson* (1956) 46 Cal.2d 818, 836.

Appellant's prejudice argument assumes that the jury could have found appellant shot the victim in reasonable defense of his property, even though it found he did not act in reasonable self-defense in protecting his person. But therein lies the flaw in appellant's contention, for "it is . . . clear that a person has no greater rights in defense of his property than he does of his life." (*People v. Smith* (1967) 249 Cal.App.2d 395, 402.) Because the jury clearly rejected appellant's claim that he was justified in using lethal force in response to an imminent threat of death or great bodily injury, it surely would not have found justification for the use of deadly force in the defense of his property. Accordingly, in the face of overwhelming evidence that appellant's use of deadly force constituted an objectively unreasonable amount of force to protect property, we find no reasonable probability that the court's omission of an instruction on defense of property affected the outcome in this case. (See *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1360 ["the intentional use of deadly force merely to protect property is never reasonable"].) The error was harmless.

Any error in the trial court's failure to instruct the jury to restart deliberations after the substitution of an alternate juror was harmless.

Appellant contends that the trial court's failure to instruct the jury to begin deliberations anew when it substituted an alternate juror requires reversal. We disagree.

On Friday, March 13, 2015, approximately 4:05 p.m., the bailiff instructed the jury to "have a seat in the jury room through the back door and across the hall, I will be with you in a few minutes." Outside the presence of the jury, the clerk advised the court that the verdict forms were not ready to give to the jury. The court responded, "It's fine, it's late in the day anyway, I'm

going to keep them for about 10 minutes they will probably be able to just pick their foreperson." At 4:20 p.m., the court admonished the jurors and ordered them to return the following Monday.

On Monday, March 16, 2015, both parties agreed to substitute one of the alternates when one juror failed to appear and could not be reached. Deliberations commenced with the substituted juror at 10:58 a.m., and the jury reached a verdict an hour later at 11:58 a.m.

When an alternate juror is substituted during deliberations, section 1089 requires "that the court instruct the jury to set aside and disregard all past deliberations and begin deliberating anew." (*People v. Collins* (1976) 17 Cal.3d 687, 694 (*Collins*), disapproved on another ground in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19.) Pattern jury instructions contain this admonition. (See CALCRIM No. 3575; CALJIC No. 17.51.) Informal admonitions to start over will also fulfill the requirement if the jury is informed it "should disregard its previous deliberations." (*People v. Proctor* (1992) 4 Cal.4th 499, 537 (*Proctor*).)

We assess the prejudice resulting from a trial court's error in failing to give an adequate admonition under the *Watson* standard. (*People v. Guillen* (2014) 227 Cal.App.4th 934, 1031.) Accordingly, where, as here, the trial court fails to give the jury any admonition at all, the error is nevertheless harmless if "there appears no reasonable probability that a more favorable verdict would have been returned had the jury been properly instructed following the substitution." (*Collins*, *supra*, 17 Cal.3d at p. 697.)

"In determining whether *Collins* error was prejudicial, we may consider whether the case is a close one and compare the time the jury spent deliberating before and after the substitution

of the alternate juror." (*Proctor*, *supra*, 4 Cal.4th at p. 537.) In *Proctor*, the court concluded that the error in the trial court's flawed admonition was harmless in light of "extremely strong" evidence against the defendant, and the relatively short deliberations before substitution as compared with the length of deliberations afterward. (*Ibid.*) Similarly, in *People v. Odle* (1988) 45 Cal.3d 386, 406 (*Odle*), the high court found no prejudice in light of "overwhelming" evidence against defendant, and pre-substitution deliberations for only part of one afternoon as opposed to two and a half days of deliberation after the substitution. In *Collins*, our Supreme Court found no prejudicial error where the case against defendant was "very strong," and the jury had deliberated little more than an hour prior to substitution of the alternate and returned guilty verdicts "a few hours" afterward. (*Collins, supra,* 17 Cal.3d at pp. 690–691, 697; see also *People v. Guillen*, *supra*, 227 Cal.App.4th at p. 1032 [no prejudice where case was not close and "duration of deliberations *prior* to substitution of the alternate juror was minimal compared to deliberations *after* substitution of the alternate juror"].)

Here, as in the foregoing authorities, the case against appellant was not close. Further, the duration of deliberations prior to the substitution was minimal compared to the deliberations conducted after substitution of the alternate juror. The jury retired to the jury room at 4:05 p.m.[6] after being told the bailiff would join them "in a few minutes." Presumably no deliberations took place before the bailiff arrived, and none could

---

[6] The court's minute order reflects that the jury retired to deliberate at 4:05 p.m., while the reporter's transcript notes the time as 4:10 p.m.

have occurred in the bailiff's presence. (See *People v. Nelson* (2016) 1 Cal.5th 513, 568 [" 'an important element of trial by jury is the conduct of deliberation in secret, free from . . . fear of exposure to the parties, to other participants in the trial, and to the public' "], quoting *People v. Engelman* (2002) 28 Cal.4th 436, 442–443.) Moreover, when the jury was excused for the weekend at 4:20 p.m., it had had no opportunity to review the verdict forms, as the clerk had not finished preparing them. It is abundantly clear from this sequence of events that no meaningful review of the evidence or discussion of the case could possibly have taken place in the 10 to 15 minutes before the jury was excused for the weekend. Accordingly, we deem harmless any error in the trial court's failure to admonish the jury to disregard its prior deliberations after substituting an alternate juror.

The authorities cited by appellant do not alter our conclusion. (*People v. Renteria* (2001) 93 Cal.App.4th 552, 557–559; *People v. Martinez* (1984) 159 Cal.App.3d 661, 666.) In stark contrast to this case, both of those cases were very close, and the jury had had significant deliberations prior to the substitution of the alternate juror.

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the minutes and the abstract of judgment to reflect the imposition and stay of the mid-term sentence of three years on count 3, and to forward a corrected copy of the abstract to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.